IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BEVERLY BEAM	)	**NO. 1:01-CV-0083**
	)	
Plaintiff	)	
	)	
vs.	)	**(Judge McClure**
	)	
SCOTT DOWNEY et al.	)	
	)	
Defendants	)	

PLAINTIFF' EXHIBITS

1.) Transcript of Proceedings held on January 5, 2005

2.) Brief of Respondent in *Beam vs. Bauer et al.* docketed at No. 1:CV-02-1797

RESPECTFULLY SUBMITTED,

BAILEY STRETTON & OSTROWSKI

By: s/Don Bailey, Esquire
4311 N. 6th Street
Harrisburg, PA 17110
(717) 221-9500

CERTIFICATE OF SERVICE

I, Don Bailey do hereby certify that on February 1, 2005 I served a true and correct copy of the following Document to the attorney listed below by First Class Postage Prepaid Mail and Electronic Means:

Kathryn Simpson, Esquire
Mette Evans & Woodside
P.O. Box 5950
Harrisburg, PA 17110

Spero T. Lappas Esquire
2080 Linglestown Road
Harrisburg, PA 17110

Stephen Russell, Esquire
Susquehanna Commerce Center East
221 W. Philadelphia Street
York, PA 17404

RESPECTFULLY SUBMITTED,

BAILEY STRETTON & OSTROWSKI

By: s/Don Bailey, Esquire
4311 N. 6th Street
Harrisburg, PA 17110
(717) 221-9500

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

BEVERLY BEAM, Plaintiff	:	
v.	:	CASE NO. 1:02-CV-01797
MARC BAUER, DR. GLENN W. ZEHNER, CAPITAL AREA INTERMEDIATE UNIT, SCOTT DOWNEY, ROGER MORRISON, DAVID L. GRAYBILL, AND MICHAEL SWEGER, Defendants	:	

TRANSCRIPT OF PROCEEDINGS
CONTEMPT HEARING

BEFORE: HON. SYLVIA H. RAMBO

DATE : January 5, 2005
10:00 a.m.

PLACE : Courtroom No. 3, 8th Floor
Federal Building
Harrisburg, Pennsylvania

BY : Wendy C. Yinger
U.S. Official Court Reporter

APPEARANCES:

SAMUEL C. STRETTON, ESQUIRE
For Donald Bailey, Esquire, and
Bailey, Stretton & Ostrowski

SPERO T. LAPPAS, ESQUIRE
For Defendants Graybill and Sweger

AMBROSE W. HEINZ, ESQUIRE
KATHRYN LEASE SIMPSON, ESQUIRE
For Defendant Morrison

A

THE COURT: Good morning, everyone. It's my understanding that there is a judgment in the Graybill matter only and that there's no judgment in Morrison, but that there is an appeal on Morrison.

MR. STRETTON: That's correct, Your Honor. That's the order of May 26th in the amount of $3712.26.

THE COURT: Thank you. Okay. My first request is, I need some argument in response to Mr. Stretton's memo concerning the proper method of going about executing on the judgment in the, I guess it would be, the Graybill matter.

MR. LAPPAS: I represent Graybill, Your Honor.

THE COURT: Yes, sir.

MR. LAPPAS: Your Honor, by way of -- is it okay if I speak from here?

THE COURT: Yes, it's fine. Hold on a minute. Go ahead.

MR. LAPPAS: Your Honor, by way of brief summary of the somewhat complicated procedural history of this case, you entered an order dismissing the lawsuit. That was appealed to Third Circuit No. 03-1874. Then you later entered an order granting fees to all of the Defendants other than Morrison. Morrison was a special case. Bauer, Zehner, the Capital Area

Intermediate Unit, Graybill and Sweger received attorney's fees by an order which you entered, which was then appealed to the Third Circuit at No. 03-2194.

The Third Circuit granted relief on both numbers, consolidated the order on November 9, 2004, granting attorney's fees under Rule 38, Appellate Rule 38, granting appellate attorney's fees. That case was reported at 383 F.3d 1000 -- I'm sorry, 383 F.3d 106.

Now the order that you entered in favor of my clients was entered under Rule 11. And Rule 11, unlike Rule 38 in the appellate court -- the courts have been clear that motions under Appellate Rule 38 are damages issues. Rule 11 is a sanctions motion. And in looking at the most recent United States Supreme Court case that I can find that discusses Rule 11, which is President Clinton's case, Clinton versus Jones.

THE COURT: Do you have a cite, please?

MR. LAPPAS: Yes, ma'am, reported at 520 United States 681, 117 Supreme Court 1636. And I'm reading from the Supreme Court page number 1652, footnote 43. It says that, the Court has inherent power to impose sanctions at a level sufficient to deter repetition of the conduct or comparable conduct by other similarly situated.

So it is a fact that we can enter judgment,

and if there are other judgments, wait in line, possibly forever, to obtain the relief that this Court ordered.

THE COURT: Wasn't there judgment entered in this?

MR. LAPPAS: There was judgment entered by this court, and then we took that judgment and recorded it in the county court where it's available to us to execute. Now Mr. Stretton's brief says that, there are numerous other judgments ahead of us. We have not -- we don't have that information.

Although, in the research that I did in preparation of today's hearing, I could find two other cases in which Mr. Bailey was imposed with sanctions by the eastern district. Now I only have the district court cites. I don't know if these have been appealed or not. But in both of these cases, his conduct was found to be in bad faith, vexatious, and resulted in substantial sanctions awards.

The point of all this argument is simply this: If Rule 11 is a sanctions motion, and if it's designed to deter comparable conduct by this respondent, as well as others, then the order must be enforced. It would create no sanctions. It would create no deterrence if the Court were simply to say to us, well, file your judgment, wait in line.

Mr. Stretton has indicated, you know, it would be unfair to everybody else if you jump to the head of the line. The fact of the matter is that, if we wait in line and never get anything, or if we're just in the posture of a standard judgment holder, there's no deterrent effect on this court's order whatsoever.

And because deterrence is part and parcel of a Rule 11 sanction, I think it's important to know some of the things that have happened since you entered your order. Since you entered your order, the Third Circuit, in ruling on Mr. Bailey's appeal in this case --

THE COURT: In which case now, the Graybill case?

MR. LAPPAS: In the case -- right.

MR. STRETTON: In the damage -- we appealed the damages from the Morrison matter and Beam.

MR. LAPPAS: But more than that, it is also an appeal from your initial order dismissing the lawsuit against everybody. There's a consolidated order. I can hand it up. It's in Third Circuit No. 03-1874 and 03-2194. It is dated September 9, 2004.

The first of those numbers was Mr. Bailey's appeal from the 12B6 motion, which dismissed this lawsuit in this court. The second number is Mr. Bailey's appeal from the order by which you granted

attorney's fees to my clients and to the Capital Area Intermediate people, everybody other than Morrison.

Morrison's grant of attorney's fees is still on appeal. It's not yet been decided. So with respect to my clients, the Third Circuit said about the appeal, reading from page 109 of the Circuit Court Reporter Decision, 383 F.3d 109, here, despite many queues from us and the district court that her cause was wholly meritless, Beam and her counsel have persisted before the district court and again before us.

Additionally, as we noted in our opinion in Beam v. Bauer, in her haste to file this lawsuit, Beam disregarded the pending appeal before this court. Beam would have been well-advised to await our opinion, which ultimately affirmed a result in the first case. Our affirmation of the district court's first dismissal was lost on counsel, who had already filed the second suit. When they speak of the second suit, they're referring to the suit that you handled. The first suit was in Judge McClure.

Had counsel been paying attention, our result would have given him notice of the fact that he had failed to discern on his own, that his client's claims were wholly without legal or factual substance. We will thus award damages to the appellees.

So even after Judge McClure and this court rejected and granted attorney's fees, an appeal was taken. It was denied. The Third Circuit used very strong language to indicate that it was meritless and warranted damages. So we have a situation there.

There have been other grants of attorney's fees against Mr. Bailey for conduct which, I think, is somewhat comparable to what we have here.

MR. STRETTON: We object to those, Your Honor. They have no relevancy today.

MR. LAPPAS: Well, I offer them as support of the need for the deterrence that Rule 11 provides.

THE COURT: What about the federal rules that talk about execution on a judgment?

MR. LAPPAS: I think the court has inherent power to order Mr. Bailey and his firm to pay the judgment that you entered under Rule 11. This was a Rule 11 order, and I think you have the power to order him to pay it.

THE COURT: You wish to respond to that?

MR. STRETTON: Yes, Your Honor, briefly. Obviously, I'm not going to repeat. Obviously, I will not repeat what is in my brief, but one of the themes that runs throughout the decisions is that, unless the federal statute or rule for which the sanctions are

being imposed through specifically has an enforcement provision, that the Rule 69, 70, and 64 of the Rules of Civil Procedure are the appropriate way in which to enforce it.

Yes, there is a deterrent effect to Rule 11 sanctions, no question about that. But the rule itself does not have a way to enforce that. If the persons who made this rule wanted to create a separate vehicle for you to enforce it through a contempt proceeding or some other way, it would have had to have been written in that rule, as I read the case law.

And Rule 11 does not contain such a sanction nor do the other statutory provisions. The sanction and deterrent is, one, the finding of bad conduct, and, two, the entering of a monetary sanction, which has now been entered into judgment. That has a deterrent effect.

And the rule -- Federal Rules of Civil Procedure are very clear as to the procedure to be used in this particular matter. As I told you in my brief, I went through some case law to see if there was utter examples of contempt being used to enforce a sanction order that had not been paid as opposed to the other one.

The only case I could find was the one I cited, but that did not appear to be on point and did

not appear to have the issues I raised or put before the court back in the early '70's when that -- with when those issues arose.

So it's our position that the procedure they are utilizing is the correct procedure, that is, going for judgment in a Court of Common Pleas of Dauphin County.

THE COURT: What about the Morrison case though? That has not been reduced to judgment.

MR. STRETTON: And that is still on appeal.

THE COURT: Well, that doesn't mean we can't still enforce it. There's been no request to stay.

MR. STRETTON: Except that, again, it's my position -- I agree, there's been no request to stay, but it's my position that, again, the way to enforce it is, when it's ripe for judgment, is to go that way. Otherwise, you could circumvent. Everyone would -- an appeal would be taken, and everyone would sprint to a court to have a contempt hearing to avoid the judgment process, the priority of liens, and other issues.

THE COURT: Well, look at the local rule 83.3.1(b).

MR. STRETTON: I'm sorry, Your Honor. What does that say? I don't have it before me.

THE COURT: I'll read it. If counsel acts

in a dilatory manner or files motions for purpose of delay or fails to comply with any rule or order of court and the judge finds that the sanctions in subsection 83.3.1(a) above are inadequate or unjust to the parties in light of the facts or circumstances, the judge may, in addition to, or in lieu of, such sanctions, assess reasonable costs directly against counsel whose action has obstructed the effect of administration of the court's business or suspend counsel from practicing in this court for a specified period of time not to exceed six months.

MR. STRETTON: Okay. Let's deal with that rule. Now that you've said it, I am familiar with that particular rule. First, it says, impose sanctions. You have imposed sanctions. Second, that rule cannot overrule the Federal Rules of Civil Procedure. It can't be an inconsistency. I would argue, it does. Third --

THE COURT: How is it inconsistent?

MR. STRETTON: Because the Federal Rules of Civil Procedure provide for a way in which monetary awards, sanctions, deterrent effect of others are to be enforced and recovered through 69, 64, and 70, the Rules of Civil Procedure. That rule perhaps seems to suggest something else. Now there's one component to that though that I would disagree with. It suggests, well,

you have the right to suspend Mr. Bailey or the firm from the practice in the middle district as part of this sanction process.

But as you're aware, there is a separate set of rules under the federal rules for disciplinary enforcement. And it would be my position that, that would be the procedure that would be used. If, for instance, this court thought that the sanctions were such that would warrant violations of the rules of professional conduct, either through filing a motion over at the Lemoyne office or this court empaneling three judge panel to hear evidence on it pursuant to your own rules, that would be the procedure used.

THE COURT: It says, any such suspension shall not be subject to Chapter 17, attorney disciplinary enforcement.

MR. STRETTON: Except, I think, that would run into a serious due process issue in terms of taking away a license, which is a property and liberty interest in doing it pursuant to a rule and not using the normal procedure. And to my knowledge, there's no case law, even in the disciplinary system, where a lawyer is unable to pay a fine and costs, that his license or her license would be taken away.

There is a procedure coming the opposite way

where one is suspended or disbarred, misused funds, and doesn't repay the funds, then they cannot apply for reinstatement unless they repay the fines. But that's a different approach. So I think there's serious constitutional problems.

THE COURT: Aren't we faced here with the court's total inability to control the court, the procedures in this court, and seeing that counsel act in the appropriate manner, and not being able, according to you, to do any enforcement, no control whatsoever over the administration of the court?

MR. STRETTON: But you do have control.

THE COURT: I don't have control.

MR. STRETTON: There's a couple things you can do. One, the sanctions deterrence you entered. Even if they cannot collect immediately, they certainly have an adverse effect against Mr. Bailey and the firm in terms of borrowing money, things of that nature, and also potentially having to pay it.

Second, you have the right for specific misconduct in your courtroom. In other words, if Mr. Bailey would do something or I would do something --

THE COURT: I'm aware of that type of contempt.

MR. STRETTON: The third, you have a right

to refer matters to the office of disciplinary counsel and/or to your own three judge panel to bring disciplinary action, if you feel it rises to that level. So you have many adequate sanctions, if you choose to do so.

Now let me just go a little further because we're here today on a contempt hearing. I'm not sure if it's civil contempt or criminal contempt that we're moving on. Obviously, there are different standards. It would seem to me that you are moving on civil contempt not criminal contempt, but I may be wrong, but you don't specify it in your order. There's two different procedures, as you well know. I don't need to tell the Court.

But for civil contempt, one aspect is ability to pay. And at least as to Mr. Bailey, I am prepared to present ample evidence of an IRS lien of 60,000, $70,000.00, credit card liens, prior judgments, some out of the eastern district, of substantial sums of money, liens and judgments from persons who have borrowed money from -- he's borrowed money from in the 100 to $130,000.00 range, all of whom feel very strongly that these liens or these judgments should not jump to the head of the class, so to speak.

So there's a serious issue as to Mr.

Bailey's ability to pay based on that, and if you need testimony, we're willing to do that. That would be one of the prongs. If you decide it's criminal contempt, of course, then it's a very different standard, different burden of proof, obviously, and it's a willful sort of situation.

Again, I think that would be negated in this particular matter. But I'm not suggesting in any way that lawyers can come in with impunity and act badly before a court. That goes against everything I've ever thought of as a lawyer and what you do and, I'm sure, what these gentlemen do. Mr. Bailey's heart is in the right place. I believe that sometimes his language is a little rough, and that's a problem.

THE COURT: We're not talking about the conduct that led to the imposition.

MR. STRETTON: I understand. But I believe there are ample remedies in this particular matter before the court.

THE COURT: What? Other than to go and -- the judgment has been entered, and you've admitted that the likelihood of converting the judgment into recovery of a monetary sum is almost nil.

MR. STRETTON: Well, people -- wonderful thing about the practice of law, the next day is a new

case, and sometimes people make money, and sometimes they get out of debt. It's there, and Mr. Bailey will pay it, if he's ever able to.

Plus it's a judgment against me also in the partnership in this particular matter. And I'm not quite in the same position as he's in in that particular matter, though I have a different argument as to my involvement in this matter in terms of lack of some notice of these actions.

THE COURT: You had notice.

MR. STRETTON: Well --

THE COURT: The very order itself setting forth the hearing is notice.

MR. STRETTON: I'm talking -- I don't mean notice for today. I mean, notice for the original judgments and the conduct. I wasn't involved. At least one of the cases arose before I was even a partner, and my partnership, which ended last week, is a very limited partnership, a partnership that was for trying cases, and only the cases I entered my appearance on. That was it. I will present testimony as to that.

THE COURT: But on the masthead, that doesn't give notice to the public, does it, or to the court?

MR. STRETTON: Nope. That's why I ended it,

and I suggested to Mr. Bailey to go back to an of counsel arrangement of sorts in that particular matter. I agree. I never had actual notice of these matters until after the fact.

But I did make a suggestion to everyone. Now we're here, and we're talking. I told Mr. Lappas, I won an award of $28,000.00 in counsel fees with Judge Caputo in a case of Fisher -- McLaughlin, et al versus Fisher. That's still in post-trial motions. It's been there about a year and a half now in post-trial motions.

I'm convinced that -- I don't know if the full amount of damages will remain or not, I don't know, but I'm convinced that the award, that the finding of liability will remain, would still give substantial damages. I don't know if 1.5 million will remain. I hope it does. But if it doesn't, there will be enough for counsel fees, in any event. It's not going to go back to a nominal damage.

I have monies that are due the firm, and by Mr. Bailey, I've offered to assign that $28,000.00 to them so this matter can be resolved in this particular matter, but I haven't gotten any response on that particular issue.

THE COURT: We're talking about all total, how much in fees from both of you?

MR. LAPPAS: Your Honor, the order in favor of my clients is between 4 and $5000.00. I don't have a dollar amount for you.

MR. STRETTON: It's $3749.17.

THE COURT: Hold on. Three thousand --

MR. STRETTON: -- 749.17 for Bauer, Zehner, Downey, for the Stock & Leader firm. And then, it's $4755.00 for Mr. Lappas's client, and that's per your order of April 21st. There is also, though it's on appeal, the Morrison amount of $3712.26, which is on appeal now, which goes also against my client, Mr. Bailey and the firm.

I have those copies of those orders, which I might as well just hand up and mark as, I guess, Respondent's 1. In fact, if you go through those orders, you'll see the first one, Your Honor, is the April order that has the two amounts that are currently at issue; Mr. Lappas's amount on the second page, and the Bauer firm amount on the first page. I'm not sure the Bauer firm has even filed a motion. I don't know if they're properly before you.

The next order is the Morrison amount, which is on appeal, the $3712.00. And then the third page is the Third Circuit's order against Mr. Bailey only for various appellate court costs. And then the fourth

order is against, which is not before you, is Judge McClure's order against Beam for a substantial amount of money.

But the first two orders are here, and then Mr. Bailey's order is here. Although Mr. Bailey asked me to point out to the Court that he disagrees with my suggestion to resolve this matter, I'm willing to do it because I'd like to see it resolved in this matter.

THE COURT: Let me hear from the Morrison group. Mr. Heinz.

MR. HEINZ: Yes, Your Honor. Just first, I'd like to join in Mr. Lappas's argument and point out that we have not entered a judgment on this award in state court as of yet. We were waiting for Your Honor's decision on how to proceed, whether the court would be willing to enforce this order through its contempt powers.

I would like to add that, subsequent to the Third Circuit's decision affirming your original order to dismiss the case and affirming the award of attorney's fees to Mr. Lappas and to the other Defendants, we were given permission to file an award or a motion for attorney's fees, and we did so, and you issued this order on May 26th, 2004.

And subsequent to that, Mr. Bailey filed an

appeal to that order, even after having notice from the Third Circuit that an appeal is not simply the next step in the process.

If this continues, Mr. Bailey is just going to continue to appeal every award, and, as Mr. Stretton has pointed out, he seems to be completely judgment proof in the state system. I think that it would be, you know, unjust for Mr. Morrison to continue to incur fees and costs in defending this action and defending an appeal to an order that Your Honor issued.

And we just feel that either this court agrees to issue a contempt order and proceed with contempt powers or we'll have to go through the state process. But in the long run, our clients just continue to incur more fees.

THE COURT: Mr. Lappas, do you have any case law that would take your case where there's a judgment outside of the Rule 69 and some of the others on enforcement of judgments and that Rule 11 is an exception to it?

MR. LAPPAS: I don't have any cases that say that Rule 11 is an exception to the method of enforcing judgments other than what I have said already. And frankly, part of what I -- I think part of what Mr. Stretton has said, and certainly the Court's comments

bolster my argument, that you have inherent power to impose sanctions. Now the sanction you imposed was a judgment and dismissal. But if that judgment is worthless, as I'm hearing, then I think you have inherent power to order payment.

And Mr. Heinz is quite correct. There have been, by my count, five appeals filed in the Third Circuit from either your orders or Judge McClure's. There was one brief filed about two -- well, about a month ago, Mr. Bailey's brief, that was really so outrageous, we filed a motion in the Third Circuit to stay the briefing schedule and for sanctions in the appellate court.

That motion was granted in part. The briefing schedule has been stayed, has been referred to an appeals court motions panel, I believe, is the correct terminology, to see what happens. In that brief, Mr. Bailey made representations that Judge McClure was personally prejudiced against him, that the courts, I don't know if he specified what court, but the courts were --

MR. STRETTON: We object to this.

MR. LAPPAS: -- were trying to engineer the outcome of various cases, that the FBI needed to investigate this situation, that the Supreme Court

should investigate it. And again, going back to Mr. Heinz's argument, there's another brief due on yet another appeal that Mr. Bailey filed. That's due on January the 10th. And Heaven only knows what that one is going to say.

You know, every time a brief is filed, we can't just ignore it. We've got to brief it. We've got to usually supplement, or often supplement, the appendix. Then, you know, there was substantial work necessary to prepare for today's proceedings. You know, I think that, you know, you sort of put your finger on it a moment ago when you said, if all you do is enter a judgment that is worthless to us -- our clients got to keep spending money.

And we can't advise them, you know, these lawsuits are frivolous, just ignore them. We've got to defend them. We've got to file the Rule 12B6 motions. We've got to file the briefs in the Third Circuit. The language of the order you entered for us was different than the language you entered against Morrison. You entered judgment for us. And in the Morrison, you said they're directed to pay.

I don't think that should be what distinguishes our positions here. You know, we have a very valid complaint that this particular attorney and

his firm filed one lawsuit after another, filed five appeals, the briefs -- well, you struck one of the briefs in this court.

It's just really reached a point where something has got to be done. I have never been in this position before in my life asking for this kind of relief, but something has got to be done. That's what we're seeking here.

MR. STRETTON: But the problem is, the same issue of why they can't collect on the state judgment is an issue or an element in the contempt. If you don't have the ability to pay, that would defeat criminal contempt because there wouldn't be willfulness.

THE COURT: Then we'll never have the ability to control conduct.

MR. LAPPAS: Your Honor, may I say one thing, please? I'm very sorry to interrupt. But one thing I think we have to concentrate on is that this order is not just against Mr. Bailey, it's against the firm. Now the order against Bailey, Stretton & Ostrowski law firm was entered by this court. It was appealed, and it was affirmed on appeal.

Now I understand -- I respect and admire Mr. Stretton. I understand he's in a difficult spot. But he's held himself out to be a partner of the firm. He

is, I believe, on the hook for that judgment just as much as Mr. Ostrowski and the firm itself, if the partnership itself has any assets.

So I really think that, just to keep concentrating on Mr. Bailey's personal financial situation is a little bit perhaps beside the point. We don't know what Mr. Stretton's situation is. We don't know what Mr. Ostrowski's situation is. We don't know what the firm does or does not have.

But we think that all four of those entities are on the hook for this order and judgment and any of them and all of them must be ordered to pay it. I'm sorry to interrupt.

MR. STRETTON: And that, because of the way the partnership's letterhead was styled, and I agree with you, I should have put in some magic words, a limited partnership, that's why I'm making the offer to assign that 28,000, or up to the amount, to take away these attorney's fees for the firm and Mr. Bailey.

Of course, the money is not here yet, but I believe -- and/or hold us in abeyance for some reason if Judge Caputo should reverse the civil verdict totally and order a retrial. I don't think that will happen, but I don't know. I have no idea what he's going to do.

But the record, I thought, was fairly strong

to maintain the verdict, the liability. To maintian the $1.5 million verdict, I don't know. That will be -- I believe there's a basis, but I don't know what Judge Caputo is going to do. That might be a reasonable way to resolve it.

Because I certainly don't want to -- certainly, if I don't win before you today, and you say, you don't have the power, I don't feel like spending the rest of my life going through depositions in aid of execution and other things, if I can avoid it. What I would like to do is, make that offer and see if everyone is willing to do it.

And I believe that, that would resolve this matter. And as soon as the money is available, it will be theirs, whatever interest it accrues during the time period. That would cover all three orders. I think the amount is enough for the Third Circuit order against Bailey, the Morrison order that's on appeal, and then the order of Your Honor.

And assuming that -- Judge Caputo has already approved my counsel fee award for the 27 or $28,000.00 figure, as I recall. So that should be sufficient to cover all these -- all that. And I'm willing to put that on the table to resolve these matters without any way compromising all my earlier

argument though.

But see, I see this differently than you in terms of the Court's power. I really -- I always get very nervous about taking away the ability of the court to control the courtroom. Because if the rules don't apply, the system becomes chaos. I am a firm believer on that.

THE COURT: That's exactly what we have here.

MR. STRETTON: But I believe that you have ample -- and you've done things that have gotten the message across.

THE COURT: I don't think so.

MR. STRETTON: Well, I can tell you, it has, for this reason.

THE COURT: It can't if he is still filing briefs that has the same type of approach that I have seen for years.

MR. STRETTON: I talked to Mr. Bailey about that. There is a possibility he may withdraw that. I have, of course, filed a motion to disassociate myself from that brief when I became aware of it. I filed that with the Third Circuit yesterday.

THE COURT: But it's obvious, you don't have any control over it either.

MR. STRETTON: But I think I do now. And I think the message -- I've had some discussions with Mr. Bailey in terms of how to present issues and that sometimes one can go too far. On the other hand, you have -- what this Court always trys to do is get advocates to help the poor, the downtrodden, the prisoner, the civil rights people. It's so hard to get plaintiff lawyers to do this.

THE COURT: Then we get bitten in the process.

MR. STRETTON: It shouldn't happen. And Mr. Bailey has to learn that, and he's learned it. I've broken up the partnership over this. I'm still here to help Mr. Bailey and try some of his cases, if he wishes me to do so. I don't know what his intentions are in the future in that regard. He's gotten the message now.

I am willing to put that 28,000, if it ever comes to reality, to resolve this or sign any document or assignment over to put this to bed, because I feel bad about it, too, in some ways. But Mr. Bailey's errors are not evil based. He gets so doggone passionate on his cases.

THE COURT: It does not excuse a person from acting professionally.

MR. STRETTON: I agree. You know that I

agree. But it's far different than someone who is just vicious and out to make money and doing things. I mean, there's another approach.

THE COURT: Hasn't Mr. Bailey, and sometimes Mr. Ostrowski, become vicious in their writings and their submissions?

MR. STRETTON: They have -- I don't know about Mr. Ostrowski. I haven't seen his. But I would agree with you, on certain things that Mr. Bailey has written, he has become too personal in his approach and drawn -- he's had good -- some interesting facts, but he's taking conclusions that go beyond the connecting of the dots of the facts. I would agree with that.

And I talked to Mr. Bailey about that. That's why I try most of his cases for him, because he doesn't have the trial temperament. But sometimes -- but he is a good appellate arguer. You know, last year, he had a case which he prevailed in the U.S. Supreme Court and did a fine job on oral argument. So he has the abilities, and he's a good lawyer, and his background is someone who warrants respect in terms of service in Congress, Attorney General, I mean, bona fide war hero, silver stars, bronze stars.

THE COURT: That does not balance out what he's been doing in the last few years.

MR. STRETTON: I agree. And he's going to stop it. And he has told me that. And he and I have had a number of discussions. Coming back from the Hoover settlement conference when you and I had a discussion, I have had several discussions with Mr. Bailey and Mr. Ostrowski on those issues and made some very strong points to both of them, and I believe both of them are starting to change.

Now I'm a little sore at Mr. Bailey for the most recent brief. That's why I disassociated myself from it. But that may be withdrawn in the future in any event. That will be Mr. Bailey's decision on that particular matter. But I still think, just having him here today and have to sit in court in front of a lot of people, it's almost like a public censure. It is a public censure in many ways, having to hear his former partner and friend sort of condemn him. I think he's gotten the message.

THE COURT: I don't think so.

MR. STRETTON: But in any event, for you to -- let's go back to the law now and not, you know, not my wish list here. I truly suggest to this court that you do not have the power and jurisdiction here for the reasons in my brief.

I also suggest, if you think you do, that

there are -- at least as to Mr. Bailey, there's no ability to pay at this particular point in time.

THE COURT: What was your response to the Morrison claim where there's no judgment?

MR. STRETTON: Well, my response had been the same as before, that would circumvent the procedure. If one did not enter a judgment, had a sanction, did not enter a judgment, and then was able to collect it, using the contempt power, and bypass the whole procedural 69, 70, and 64 Rules of Civil Procedure for collecting monetary judgments, it would create a glaring exception in that particular matter.

THE COURT: Your proposal that you've made, all the other judgments that you say are against Mr. Bailey, are they against him individually or are they against the firm?

MR. STRETTON: On the judgments that I handed up to Your Honor, I didn't mark it, but on the first one, the $3749.17 is against the firm and Mr. Bailey.

THE COURT: No, no, I'm not talking about these. You say that there are other judgments already ahead.

MR. STRETTON: They're against Mr. Bailey.

THE COURT: Just individually?

MR. STRETTON: Yes. They are his own personal IRS judgments, liens. He had sanctions before Judge Joyner in '95.

THE COURT: But you're not involved in that?

MR. STRETTON: I represent him, but I was not a partner with him. I represented him trying to overturn those before Judge Joyner. To my knowledge, there's no Bailey judgments against me.

THE COURT: My concern is whether your offer might be in jeopardy if you make an offer of payment on one judgment. I know we're not in bankruptcy or anything, so there wouldn't be a preference, but I was just concerned.

MR. STRETTON: It would not. My own personal situation -- I mean, everyone has debt, but I am on a major lien. My wife is president in Gateway Medical, and I had to co-sign a $3 million or $2 million lien, which is still Gateway Medical, which is a major medical practice in Chester County where about 20 doctors and others. But I mean --

THE COURT: You don't need to go into details. I just want to make sure that an offer that you have would work.

MR. STRETTON: Well, the offer I made would cover the first -- would cover your order of April 21st,

would cover the order of May 26th, and it would also cover the Third Circuit's order against Mr. Bailey of September 9th.

THE COURT: I don't think I have any jurisdiction over that.

MR. STRETTON: I understand that. But I want to put -- even though that's just against Mr. Bailey, I'm his friend, and I'm trying to get these behind him. Now whatever the Third Circuit does in the future on this brief, if they do impose sanctions, unless they do it against the firm, that's Mr. Bailey that is going to have to rise or fall on that on his own.

But I want to put this aside because I'm a little -- I feel a little embarrassed about this, and I feel that I was somewhat unethical by not properly having the partnership reflect the limited nature of it, and I know better under Rule 7.5 of the rules of professional conduct in terms of how a partnership is supposed to be styled.

Based on that, I'm willing to offer these monies. Again, they're not here yet, but I believe that they're going to be there at some point, to resolve these issues, if that can be done so we don't have to have a contempt hearing.

THE COURT: Mr. Lappas.

MR. LAPPAS: Your Honor, Mr. Stretton did talk to me about that either yesterday or the day before, sometime in the last few days. And as I told him then, and again equally before court today, the way I understand it is, he has a verdict, and as part of that verdict, he has an order awarding him attorney's fees.

That case is now before the district court on post-trial motions. He says he thinks he's going to hold onto the verdict in some part. And maybe he will. I don't know. I'm not familiar with the case. After that, of course, there's going to be appeals to the Third Circuit. I believe the case that we're talking about now is against the Commonwealth.

You know, it's sort of pie in the sky. And he's really asking us to wait for a pretty long time for an uncertain result, one that he can't guarantee. So I don't think that's -- I mean, I respect the offer. I think it's made in good faith. But I don't think it's a realistic disposition of these issues.

THE COURT: Mr. Heinz.

MR. HEINZ: If I could, I would just like to respond to Mr. Stretton's comment about how this, an enforcement of this order would cause a run and people

to appeal to the Court for a contempt proceeding. I would just like to point out that this proceeding would not be at all warranted or even necessary if Mr. Bailey hadn't filed an appeal and failed to file a bond, which is the proper procedure for insuring that, you know, there is a security for payment if we are successful on the appeal.

If he couldn't afford the bond at the time when the court issued the order, he certainly could have appealed to the court for reconsideration at that time. He didn't do that. He filed an appeal knowing that we could not collect on a judgment in state court. Thank you.

MR. STRETTON: My only response to Mr. Lappas, and I understand, maybe it's a little pie in the sky, my offer, but it would seem to me that, whatever procedure happens, whether he continues to try to execute judgment or you have a contempt hearing, assuming that I lose the contempt hearing and there is orders entered, we still have to look at the ability to pay.

And it may be a substantial delay just on that particular issue. And for other -- I'm not saying that there would be an appeal, but certainly I would look at this strongly because I think there is some

interesting issues here in terms of the Court's power to enforce these monetary sanctions, supposedly going through the Rules of Civil Procedure.

It would seem to me that my offer is made in good faith, and we can revisit it if I should lose with Judge Caputo. And I'm going to know real soon, at least I would suspect, with a year and a half now gone by in post-trial motions, two years from the trial is February.

I suspect Judge Caputo is going to be issuing an order very shortly in this particular matter one way or the other, so everyone will know. So maybe the other thing could be that we just hold this in abeyance, but in the interim, you enter an order locking in my counsel fees for this purpose. And I'll sign anything they give, present to me, so I can assign it over to them so these matters can be resolved.

THE COURT: What's the name of the case before Judge Caputo?

MR. STRETTON: It is John McLaughlin and Micewski versus Judge Fisher, then Attorney General Fisher, Pappert, and various people who were heads of the various divisions. It was a $1 million punitive damage against them collectively.

THE COURT: Well, I don't want to know the

facts. What's the number? What's the case number?

MR. STRETTON: I don't have that with me. I could have that faxed to you this afternoon and to everyone via fax. I'm sorry.

THE COURT: I'm going to take the matter under advisement. I may need some more briefing. I don't know. But I need more time. I've heard everything that's been said. Is there anything further?

MR. STRETTON: Unless you want testimony in support of our position that Mr. Bailey is essentially judgment proof and doesn't have the ability to pay except maybe some limited payout schedule for a month, and then on that particular issue. I don't know if you want to -- then we go to the issue of contempt with one prong in the civil contempt of the ability to comply or pay, if you need testimony on that.

I prefer not getting into that at this particular point in time if we could avoid it. And I prefer and would ask that you enter an order attaching my 27 or $28,000.00 award pending at least your decision this or resolving this. What I can assure you that I will do during, even though I'm no longer a parter in the firm, so that this doesn't occur in the future, and after our conversation about a month ago, perhaps I should have taken a more aggressive role.

I have one other suggestion. What often times we do in the state system when there's issues over lawyers, we appoint a practice monitor who sort of reviews the documents and pleadings. I'm willing to play that role.

See, I didn't look at the material before. I only looked at what I was trying for Mr. Bailey. But if this court has a way to resolve this, and also to insure in the future, I'd be willing to sit as a practice monitor, review what he's doing, submit a report to the Court on a monthly basis, even though I'm no longer a partner, and to make sure that Mr. Bailey is still the vigorous advocate but he doesn't --

THE COURT: With your schedule, how are you going to do that?

MR. STRETTON: I can make time. I don't need a lot of sleep. But if I could help my friend -- he's my friend.

THE COURT: Mr. Lappas.

MR. LAPPAS: I just wanted to say two things. Number 1, I don't need testimony today on the question -- I'm not requesting testimony today on the question of whether or not Mr. Bailey is judgment proof or not. But the brief that was filed by Mr. Stretton on behalf of Donald Bailey and the law firm makes a number

of arguments why he individually, Mr. Stretton, and why the firm should not be held to the judgment that was entered by this court, and he's repeated some of those arguments today.

I just want to -- I guess, if the Court is going to entertain that argument now, then I think there should be some testimony on record. But I would repeat what I said earlier. The order against Bailey, Stretton & Ostrowski, the firm, was entered. It was appealed. It was affirmed on appeal. I don't think it's subject to any arguments now about due process or otherwise. That's number 1.

Number two. If the Court is going to order a briefing, or even if you're not going to order briefing, I would request a reasonable period of time to file a supplemental request for additional attorney's fees relative to the litigation of the motion and the preparation for today's proceedings.

And although I don't want to speak for Mr. Heinz, I'm sure he makes the same request.

MR. HEINZ: Yeah, I would make the same request. Thank you.

MR. STRETTON: I feel like we're spinning the wheel. I would hope that they might reconsider counsel fees for this because I think that there's some

valid arguments. This is not a frivolous defense to the motion for contempt. But that's their call. I'd like to stop it now. That's why I'm trying to offer this. I'll agree to be a practice monitor or I'll find someone else. I can ask Bob Davis, my friend, or someone else to do this or review what Mr. Bailey is doing, if you think I'm too busy.

I just want to stop this and start and let Mr. Bailey continue with his practice in the right way and stop the clock running for them on these matters so they can go back to making real money and help their clients on other matters.

THE COURT: I'm going to defer, and I'll be back in touch with you.

MR. STRETTON: Thank you.

THE COURT: Court's adjourned.

COURTROOM DEPUTY: Court's adjourned.

(Whereupon, the proceeding adjourned at 10:51 a.m.)

CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

Wendy C. Yinger, RPR
U.S. Official Court Reporter
(717) 440-1535

The foregoing certification of this transcript does not apply to any reproduction by any means unless under the direct control and/or supervision of the certifying reporter.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BEVERLY BEAM,	:	NO. 1:CV-02-1797
PLAINTIFF	:	
	:	(JUDGE RAMBO)
V.	:	
	:	(ELECTRONICALLY FILED)
MARC BAUER, GLENN ZEHNER,	:	
CAPITAL AREA INTERMEDIATE	:	
UNIT, SCOTT DOWNEY, ROGER	:	
MORRISON, DAVID GRAYBILL and	:	
MICHAEL SWEGER,	:	
DEFENDANTS	:	

BRIEF OF THE RESPONDENT, DONALD BAILEY, AND THE LAW FIRM OF BAILEY, STRETTON & OSTROWSKI AS TO WHY THEY SHOULD NOT BE HELD IN CONTEMPT FOR NOT PAYING ATTORNEY'S FEES AWARDED BY THIS COURT TO OPPOSING COUNSEL

The Respondents, Attorney Donald Bailey and the Law Firm of Bailey, Stretton & Ostrowski, respectfully file this Brief in support of their position that neither the Law Firm of Bailey, Stretton & Ostrowski nor Mr. Bailey should be held in contempt for the failure to pay the counsel fees awarded previously by this Honorable Court.

The Order of the Honorable Sylvia Rambo, which is dated May 26, 2004, states in pertinent portions as follows:

> "The sum of $3,712.26 is awarded to Defendant Morrison through his counsel, Kathryn Simpson, Esquire, and against Plaintiff's Attorney Donald Bailey and the Law Firm of Bailey, Stretton & Ostrowski, jointly and severally." (See Order dated May 26, 2004 of the Honorable Sylvia Rambo).

First, as to the Law Firm of Bailey, Stretton & Ostrowski, present counsel would argue that the award should not be against that particular firm. Mr. Stretton has a very limited

B

partnership with Mr. Bailey and that partnership is only for Mr. Stretton to try specific cases for Mr. Bailey. There is no sharing of expenses or costs. Mr. Stretton was not aware of this case or the issues involved in this case during the pertinent times and had no involvement in the same.

More importantly, there should be no finding of contempt in this particular matter. There was an award of attorney's fees, which apparently was entered as a judgment in the Court of Common Pleas of Dauphin County as told Mr. Bailey by one of the Defendant's counsel. This Honorable Court should not use its contempt authority to by-pass the execution of judgment procedures that have been developed over the years.

Federal Rule of Civil Procedure, Rule 69, governs the execution for payment of a monetary judgment. That rule notes as follows:

> "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in a manner provided in these rules or in a manner provided by the practice of the state in which the District Court is held." (Federal Rules of Civil Procedure, Rule 69).

That rule clearly states that the collection of an award of money is by entry of judgment pursuant to the Pennsylvania Rules and in the Pennsylvania Courts. Pennsylvania has specific procedures for entering a judgment and executing judgment. These are available to the Petitioners.

Further, Federal Rule of Civil Procedure Rule 64 again references the state procedure for the seizure of property of persons in aid of execution of judgments.

> "At the commencement of and during the course of an action, all remedies providing for seizure of a person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the District Court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) In the existing statute of the United States governing to the extent to which it is applicable; (2) the action of which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from the State Court, shall be prosecuted after removal pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and any other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action." (Federal Rules of Civil Procure, Rule 64).

To present counsel's knowledge, there is no federal statute that would override the state execution process as outlined in the above quoted Federal Rules of Civil Procedure. Therefore, in federal monetary awards, the state law provides the remedies for the entry of judgment and the execution and seizure of the

property to secure the satisfaction of the judgment that was entered. This concept has been long standing as set forth in the United States Supreme Court case of Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 94 Sup. Ct. 1113 (1974).

> "As we view the matter, the express provision in 1450 that state law governs attachments after removal, is simply an additional statement of long settled federal law providing that all cases in federal court, whether or not removed from state court, state law is incorporated to determine the availability of prejudgment remedies, procedure of persons or property to secure satisfaction of the judgment ultimately entered." (See Federal Rule of Civil Procedure, Rule 64). Id. 1123.

The case law since then has been fairly uniform that the federal court is bound by state law when there is a state-created seizure remedy used or the state execution of process remedy is available. Unless there is a particular federal statute that provides the remedies to secure satisfaction of judgment, the state procedure is to be utilized. In this case, there is no such federal statute.

There is good reason for utilizing the state judgment process. For instance, the evidence would demonstrate that Mr. Bailey has other judgments against him. It would be very unfair that those previous judgments could not maintain their order of priority. A contempt proceeding which ordered payment as a sanction would be extremely unfair to earlier judgment holders. That would create total chaos in the execution process. The

evidence would demonstrate that Mr. Bailey has no assets upon which to execute. That information can be obtained through the execution procedures process in the state system, including depositions in aid of execution.

Therefore, it appears this court would not have jurisdiction in the context of a contempt proceeding to, in essence, attempt to enforce a judgment. The procedures for such an enforcement have been clearly stated by the Federal Rules of Civil Procedure, Rules 64, 69 and 70 through the state judgment and execution process. That process cannot be circumvented or by-passed by using a contempt procedure when the primary purpose of the contempt procedure would presumably be to enforce the judgment and execute on the judgment.

The contempt procedure is found at 18 U.S.C.A. 401 for criminal contempt. That involves misbehavior in the court's presence or misbehavior of an officer in their official transactions, or disobedience or resistance to the lawful writ, process, order, rule, decree or command (18 U.S.C.A. 401). For criminal contempt, there is an element of willfulness, which is not present in civil contempt (United States v. Saccoccia, 342 F.Supp. 2d 25 (District Court, Rhode Island, 2004).

For civil contempt, the attorney must have notice of the order, the order must be clear, definite, and unambiguous, the

attorney has to have the ability to comply with the order and the attorney has to violate the order. Id 30, 31.

A person cannot be held contempt for failure to comply with a contempt order unless the person has notice of the order and its terms. Id 30, 31. At least as to the Law Firm of Bailey, Stretton & Ostrowski, there was no such notice at least as to Attorney Samuel C. Stretton. As to Attorney Bailey, the testimony would show he has no ability to comply with the order because of his financial circumstance.

The Saccoccia case arose out of a situation where a firm had been ordered to refund fees paid to them by a criminal defendant after these fees were found to be tainted in some fashion. That is not the situation in the present case where, unfortunately for Mr. Bailey, there was an order sanctioning him for his handling of the underlying case. But, that order is subject to execution through the normal judgment procedures and should not fit within the categories of criminal or civil contempt. There is a specific procedure for execution of judgments in the state system. In fact, to present counsel's knowledge, this procedure according to Mr. Bailey has been utilized and a judgment has been entered in the state system.

Although in the old cases of Lichtenstein v. Lichtenstein, 425 F.2d 1111 (3rd Cir., 1970) and Lichtenstein v. Lichtenstein, 481 F.2d 682 (3rd Cir., 1973), there was an issue of a contempt

payment and a Rule to Show Cause and why it should not be enforced, these cases did not appear to address the question raised by present counsel that there would be no jurisdiction and/or ability to enforce the monetary award since the correct procedure would be pursuant to the entering of a judgment and writs of execution using Pennsylvania State Law as noted in Federal Rules of Appellate Procedure, Rules 64, 69 and 70.

Therefore, it appears that the Order to Show Cause should be dissolved since the Petitioners' remedies lie not with a contempt request by this Honorable Court, but in utilizing the state's execution and judgment procedures as they have already done. This Honorable Court does not have the jurisdiction to, in effect, enter judgment and collect. The contempt procedure cannot be utilized in that fashion, as noted above and there are good public policy reasons not to do so.

Finally, there is a serious due process argument in terms of the Law Firm of Bailey, Stretton & Ostrowski, particularly as to Attorney Stretton, who had no knowledge and no opportunity to respond to any of this previously. Further, Attorney Stretton has his own law practice with offices in Philadelphia and West Chester, which is entirely separate from Mr. Bailey's practice. The only connection is a limited partnership, which was done by a handshake where Mr. Stretton will try some of Mr. Bailey's cases when Mr. Bailey enters Mr. Stretton's appearance to do so.

There is no fee sharing at all except on those particular cases if there is an award or judgment.

In conclusion, Mr. Bailey and the partnership of Bailey, Stretton & Ostrowski, respectfully requests this Honorable Court dismiss the Rule to Show Cause for the reasons above stated and make no finding of contempt.

Respectfully submitted,

s/Samuel C. Stretton
Samuel C. Stretton, Esquire
Attorney for Donald Bailey, Esq.
and Bailey, Stretton & Ostrowski
301 South High Street
P.O. Box 3231
West Chester, PA 19381-3231
(610) 696-4243
Attorney I.D. No. 18491

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BEVERLY BEAM, PLAINTIFF	:	NO. 1:CV-02-1797
	:	(JUDGE RAMBO)
V.	:	
	:	(ELECTRONICALLY FILED)
MARC BAUER, GLENN ZEHNER, CAPITAL AREA INTERMEDIATE UNIT, SCOTT DOWNEY, ROGER MORRISON, DAVID GRAYBILL and MICHAEL SWEGER, DEFENDANTS	:	

CERTIFICATE OF SERVICE

I hereby certify I am this date serving a copy of the Brief of the Respondent, Donald Bailey, in the captioned matter upon the following persons in the manner indicated below.

Service by First Class Mail addressed as follows:

1. Honorable Sylvia H. Rambo
United States District Court for
the Middle District of Pennsylvania
966 Federal Building
228 Walnut Street
Post Office Box 983
Harrisburg, PA 17108-0983

2. Spero T. Lappas, Esquire
Serratelli, Schiffman, Brown
& Calhoon, P.C.
2080 Linglestown Road
Suite 201
Harrisburg, PA 17110-9670

3. Kathryn L. Simpson, Esquire
Mette, Evans & Woodside
3401 North Front Street
Harrisburg, PA 17110

4. Stephen S. Russell, Esquire
Susquehanna Commerce Center East
Sixth Floor
221 W. Philadelphia Street
York, PA 17404

5. Donald Bailey, Esquire
4311 North Sixth Street
Harrisburg, PA 17110

Respectfully submitted,

12/27/04
Date

s/Samuel C. Stretton
Samuel C. Stretton, Esquire
Attorney for Donald Bailey, Esq.
and Bailey, Stretton & Ostrowski
301 South High Street
P.O. Box 3231
West Chester, PA 19381-3231
(610) 696-4243
Attorney I.D. No. 18491